ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 142

[FRL–5227–5]

RIN–2040–AC19

National Primary Drinking Water Regulations Implementation Primary Enforcement Responsibility

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA is promulgating final language revising the regulation that sets forth EPA's process for initiating the withdrawal of a State's primary enforcement responsibility (primacy) for the Public Water System Supervision Program under the Safe Drinking Water Act and making technical clarifying amendments to other parts of the primacy regulation. The revised language clarifies issues of EPA's timing and discretion in initiating the primacy withdrawal process and simplifies some of the rule language. The intended effects of these revisions are to eliminate confusion about the Agency's primacy withdrawal policy and to respond to a court ruling that requires a change to the regulatory language on withdrawals. These revisions reflect existing Agency policy and therefore should not impose any burden on States or otherwise affect EPA-State relations.

EFFECTIVE DATE: The final rule will take effect July 28, 1995. In accordance with 40 CFR 23.7, this regulation shall be considered final Agency action for purposes of judicial review at 1 p.m. eastern time on July 12, 1995.

ADDRESSES: Supporting documents for this rulemaking are available for review at EPA's Water Docket; 401 M Street, SW., Washington, DC 20460. For access to the Docket materials, call (202) 260–3027 between 9 a.m. and 3:30 p.m. for an appointment.

FOR FURTHER INFORMATION CONTACT: The Safe Drinking Water Hotline, toll free (800) 426–4791, or Judy Lebowich; Drinking Water Implementation Division; Office of Ground Water and Drinking Water; EPA (4604), 401 M Street, SW., Washington, DC 20460; telephone (202) 260–7595.

SUPPLEMENTARY INFORMATION:

A. Background

40 CFR part 142, subpart B, sets out requirements for States to obtain primacy for the Public Water System Supervision (PWSS) program, as authorized by section 1413 of the Safe Drinking Water Act (SDWA). In 1989, EPA promulgated amendments to these regulations establishing procedures for States to revise their primacy programs to adopt the requirements of new or revised EPA drinking water regulations. (54 FR 52126, December 20, 1989) The 1989 rulemaking also modified the regulatory language pertaining to EPA's initiation of procedures that could lead to withdrawal of primacy status. The provision on withdrawals is contained in § 142.17(a) and is the subject of today's action.

As promulgated in 1989, § 142.17(a)(2) leaves to the Administrator's discretion whether to initiate primacy withdrawal proceedings after he or she has determined that a State no longer meets federal primacy requirements. The National Wildlife Federation (NWF), in a petition for review filed in the U.S. Court of Appeals for the District of Columbia Circuit (*National Wildlife Federation* v. *Reilly*, No. 90–1072) challenged several aspects of the 1989 regulatory amendments, including the primacy withdrawal language.[1] Among other challenges, NWF alleged that EPA was without statutory authority to promulgate a revision making explicit that it is within EPA's discretion whether to initiate proceedings to withdraw a State's PWSS primacy program.

The U.S. Court of Appeals for the D.C. Circuit issued an opinion on December 11, 1992, in response to this challenge. *National Wildlife Federation* v. *EPA*, 980 F.2d 765. The Court found that while EPA has broad discretion under the SDWA on when to ''determine'' that a State is out of compliance with primacy requirements, once the Administrator has made this determination, the SDWA requires EPA to initiate the primacy withdrawal process by notifying the State of why such a determination was made, allowing the State 30 days to respond, and proceeding toward a final decision, including public notice and opportunity for hearing on decisions to withdraw primacy. The Court found EPA's primacy withdrawal regulation to be invalid because it does not require the Agency to take these steps—instead, the regulation says that after ''determining'' that the State is out of compliance with primacy, the Administrator ''may'' initiate withdrawal proceedings. The Court therefore remanded the regulation to EPA for modification.

[1] The Notice of Proposed Rulemaking (59 FR 40458, August 8, 1994), a copy of which is in the Docket, summarizes NWF's challenges to the 1989 rulemaking and the disposition of this litigation.

The Court emphasized that its review focused only on what EPA ''may do following a formal determination of noncompliance and does not require delving into the Administrator's complex decision-making process regarding whether to make such a determination in the first instance.'' *Id.* at 774. The Court acknowledged that the Agency is ''free to decide that technical, temporary or otherwise unimportant violations of the primacy requirements do not warrant a 'determination' of noncompliance, or that the better approach for meeting the Act's goals is to negotiate with the offending state or to permit more time for the state to come back into compliance.'' Thus, EPA may ''negotiate with the state as long as necessary before determining that the primacy requirements are no longer met.'' *Id.* at 771.

The Court also noted that ''even where a 'determination' of noncompliance is made, the statute does not require the Agency to immediately withdraw primacy. Rather, the EPA is directed to provide notice and a public hearing before its determination of nonconformity with the primacy standards becomes effective. As a consequence of evidence adduced at the hearing, the EPA is entitled to conclude that its original decision was in error or that the State has remedied any deficiency and to decide against withdrawal.'' *Id.* at 771 (citations omitted).

In response to the Court's remand, EPA published a Notice of Proposed Rulemaking (59 FR 40458, August 8, 1994) seeking public comment on the following proposed changes to the language of Section 142.17(a):

1. Revise the wording of § 142.17(a)(2) to clarify that the Administrator ''shall'' initiate primacy withdrawal proceedings once he or she formally ''determines'' that a State is out of compliance with primacy requirements;

2. Revise the wording of § 142.17(a)(2) to clarify that the Administrator intends to take at least two relevant factors into consideration, if appropriate, in making a formal determination that a State no longer meets primacy requirements. These factors are: (1) Whether the State has been granted, or is awaiting EPA's decision on, an extension of up to two years of the 18-month deadline for having submitted a final program revision application to EPA to address a new or revised federal drinking water regulation; and (2) whether the State is taking corrective actions that the Administrator may have required to correct State program deficiencies;

3. Revise the wording of § 142.17(a)(2) to clarify that the Administrator shall

notify the State in writing that ''EPA is initiating'' (rather than ''of EPA's intention to initiate'') primacy withdrawal proceedings;

4. Revise the wording of § 142.17(a)(4) to clarify that EPA will make a ''final determination'' regarding primacy withdrawal after the State has had the opportunity to respond to the Administrator's written notice initiating primacy withdrawal; and

5. Clarify that States must meet all the primacy requirements specified in 40 CFR 142, subpart B, by replacing references to ''§ 142.10'' in §§ 142.17(a)(1), 142.17(a)(2), and 142.17(a)(4) with references to ''40 CFR 142, subpart B.''

Today's action promulgates all of the revisions to the primacy withdrawal provisions that were proposed on August 8, 1994.

B. Summary of Comments and EPA Responses

Four groups (consisting of a State, an association of State drinking water programs, and two drinking water trade associations) submitted comments on the proposed regulations. These comments and EPA's response are part of the public Docket. Three of the commenters fully support the proposed rule because they believe it continues to provide EPA broad discretion in considering whether to initiate withdrawal. They stress the need for this discretion and note the importance of the Agency considering whether the conditions for not meeting the requirements for continued primacy are temporary and likely to be corrected or are of an on-going long-term nature. One of these commenters also notes that public health protection should be the key factor in any primacy withdrawal decision.

The fourth commenter agrees that EPA should have broad flexibility in making primacy withdrawal determinations. This commenter expressed concerns, however, that the proposed regulatory changes would severely restrict this flexibility, and this commenter opposes any such change in flexibility. This commenter reads the proposal to say, for example, that EPA must initiate primacy withdrawal if the State exceeds the two-year extension period, even if the State is making a good faith effort towards compliance. The commenter could support changes to the primacy regulations if more weight were given to the two listed factors that the Administrator considers in making the determination that a State is out of compliance with primacy requirements. Specifically, according to the commenter, the regulations should say that EPA ''must'' or ''shall'' consider the two listed factors (which are relevant to a State's good faith efforts toward compliance) rather than that EPA ''intends'' to consider these factors.

The commenter has misinterpreted the meaning and effect of the regulatory changes that were proposed and are now promulgated. To reiterate, even after today's revisions, the primacy regulations afford broad discretion to EPA. They do not set forth any specific factual situation in which the Administrator is required to determine that the State no longer meets primacy requirements and to initiate primacy withdrawal. For example, even where a State fails to have an approved program revision in place within the two-year extension period, the regulations do not require the Administrator to determine that the State no longer meets primacy requirements. It is still within the Administrator's discretion to make this determination, in light of factors that include the extent and timeliness of the State's continuing good faith efforts to adopt the revisions. EPA will judge each case on its own merits. EPA emphasizes, however, that it ordinarily intends to consider this particular example—i.e., where the State misses the two-year extension deadline—to be a strong candidate for initiating primacy withdrawal. Indeed, although the commenter cites specific problems that may prevent a State from meeting this deadline, there have been past instances in which States have resolved such problems only after receiving notice of EPA's intent to initiate primacy withdrawal. When the State provides a reasonable schedule for adopting the regulations and submitting a final primacy revision package to the Agency, the Agency's policy is to cancel the primacy withdrawal proceedings. The revised regulations will not alter this policy.

C. Summary and Explanation of Today's Action

After carefully considering all of the public comments, EPA is retaining the changes to §§ 142.17(a)(1), 142.17(a)(2), and 142.17(a)(4) that were proposed on August 8, 1994. In addition, the Agency is making technical amendments to the language of §§ 142.11 and 142.13 to clarify the timing of the process for public notice and opportunity for comment.

1. Changes to Primacy Withdrawal Provisions

Today's action results in the following changes to the primacy withdrawal provisions.

First, EPA is modifying the language of § 142.17(a)(2) by substituting the term ''shall'' for ''may''. Specifically, the language of § 142.17(a)(2), as promulgated in December 1989, states that the Administrator ''may'' initiate primacy withdrawal proceedings once he or she determines that a State's primacy program fails to continue to meet federal requirements for primacy. Today's action requires the Administrator to initiate primacy withdrawal proceedings once the Administrator makes this formal determination.

The language of § 142.17(a)(2), as promulgated in December 1989, contains the clause, ''When, * * *, the Administrator determines * * *, and the State has failed to request or has been denied an extension under § 142.12(b)(2) of the deadlines for meeting those requirements, or has failed to take other corrective action required by the Administrator, * * *.'' EPA is modifying § 142.17(a)(2) to delete this clause. In its place, EPA is revising the paragraph to read as follows: ''When, * * *, the Administrator determines * * *, the Administrator shall initiate proceedings to withdraw primacy approval. Among the factors the Administrator intends to consider as relevant to this determination are the following, where appropriate: Whether the State has requested and has been granted, or is awaiting EPA's decision on, an extension under § 142.12(b)(2) of the deadlines for meeting those requirements; and whether the State is taking corrective actions that may have been required by the Administrator.'' EPA explained its rationale for making this change in the August 8, 1994 proposal. EPA's intent in making this change is to clarify the Administrator's discretion and to note two cases where the Agency generally expects to find no reason to initiate primacy withdrawal since the State is taking timely and appropriate action to remedy program deficiencies. As discussed above, EPA does not believe that this language limits the Administrator's discretion to determine whether or when a State no longer meets the requirements for retaining primacy.

Section 142.17(a)(2) also requires the Administrator to provide the State written notification that the Agency is initiating primacy withdrawal proceedings. EPA is modifying the language of § 142.17(a)(2) to replace the term ''of EPA's intention to initiate'' with ''that EPA is initiating'' to be more direct about the action being taken. The Agency believes the phrase ''intention to initiate'' may be confusing since it

does not clearly state whether EPA is or is not initiating withdrawal as of that date.

These changes to the language of § 142.17(a)(2) require the Administrator to initiate primacy withdrawal proceedings once the Administrator makes a formal determination that the State no longer meets the requirements for primacy. EPA emphasizes that the Agency still retains full discretion to decide whether and when to reach this formal determination. For example, as explained in the August 8, 1994, proposal there may be no reason to formally determine that a State program no longer meets the requirements for primacy if the State has missed a deadline for adopting new drinking water regulations but has been granted or is seeking an extension of that deadline under § 142.12. Similarly, there may be no reason to makes this formal determination if the State is otherwise carrying out any corrective actions that EPA may have ordered that would eliminate the deficiencies in the State program. Nevertheless, EPA wishes to make clear its general policy and intention to continue to vigorously pursue the need for: corrections to State programs; and initiating primacy withdrawal whenever a State is not acting in good faith to maintain the requirements for primacy.

EPA also is making a minor change to the language of § 142.17(a)(4). As promulgated in December 1989, this provision states that after reviewing a State's submission made in response to the notice that EPA is initiating primacy withdrawal proceedings, ''* * * the Administrator shall either determine that the State no longer meets [primacy] requirements * * * or that the State continues to meet those requirements * * *. Any determination that the State no longer meets the requirements * * * shall not become effective except as provided in § 142.13.'' EPA is modifying the language of § 142.17(a)(4) by substituting the phrase ''make a final determination either'' for the phrase ''either determine.'' EPA also is substituting the phrase ''Any final determination'' for the phrase ''Any determination.'' This change, which was discussed in the August 8, 1994 proposal, clarifies that the Administrator's ''final determination'' under § 142.17(a)(4) is distinct from the initial determination made under § 142.17(a)(2) and is preceded by an opportunity for public comment.

EPA emphasizes that these changes do not alter the primacy withdrawal process. That process consists of the following sequential steps.

1. EPA's receipt of information, either through its annual review of the State program (§ 142.17(a)(1)) or otherwise, that the State program may no longer be in compliance with the requirements for primacy.

2. EPA's formal determination, made at its discretion, that the State no longer meets the primacy requirements and notification to the State that primacy withdrawal is being initiated (§ 142.17(a)(2)).

3. The State's response to EPA's notice (§ 142.17(a)(3)).

4. Final EPA determination that the State meets or does not meet the primacy requirements and notification to the State, including a notice to the public and opportunity for a hearing when the EPA's final determination is that the State does not meet primacy requirements. (§ 142.17(a)(4)).

Finally, EPA is replacing the references to ''§ 142.10'' contained in §§ 142.17(a)(1), 142.17(a)(2), and 142.17(a)(4) with references to ''40 CFR part 142, subpart B.'' Section 142.10 no longer contains all of the requirements a State must meet to obtain/retain primacy. Section 142.10 contains the basic requirements, however, other portions of 40 CFR part 142, subpart B, contain additional primacy requirements associated with individual drinking water regulations. EPA is therefore revising the language of § 142.17(a) to clarify that States are expected to meet all primacy requirements contained in 40 CFR part 142, subpart B.

2. Other Technical Amendments

EPA is today also making two technical clarifying amendments to the language of §§ 142.11(b)(1) and 142.13(a). First, EPA is replacing the word ''determination'' whenever it occurs in § 142.13(a) with the words ''final determination'' to clarify that the public notice and opportunity for public hearing requirements specified in § 142.13 occur after the Administrator has made a final determination on a State's or Tribe's primacy application under § 142.11, program revision application under § 142.12, or to withdraw primacy under § 142.17. Second, in order to clarify the Agency's intent that there be an opportunity for public notice and comment on a State's or Tribe's initial primacy application, regardless of whether the Administrator's final determination is to approve or disapprove that application, EPA is revising § 142.11(b)(2)as follows: (1) insert the word ''final'' before the word ''determination''; replace the words ''has met the requirements'' with the words ''has met or has not met the requirements''; and insert the words ''the public notice requirements and related procedures under'' before the word ''§ 142.13.'' This change is simply a clarification since § 142.13(a) already requires an opportunity for a public hearing in either case.

Because these changes to section § 142.11(b)(2) and § 142.13(a) are simply minor clarifications and are non-substantive, good cause exists for finding that an additional notice and comment period is unnecessary (see § 553 of the Administrative Procedures Act). Moreover, these changes are logical outgrowths of the proposal, which made it clear that through this rulemaking, EPA is distinguishing between its final determinations and the earlier formal determinations that require initiation of primacy withdrawal. Therefore, an additional comment period is unnecessary in any event.

D. Impact of These Revisions

1. Executive Order 12866

Under Executive Order 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(a) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(b) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(c) Materially alter the budgetary impact on entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(d) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

2. Regulatory Flexibility Act

Pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), EPA certifies that this rule will not have a significant economic impact on a substantial number of small entities because it merely revises existing procedural

requirements for initiating withdrawal of State primacy by clarifying the extent of EPA discretion in initiating the process; States are not considered small entities under this rulemaking for RFA purposes.

3. Paperwork Reduction Act

This rulemaking contains no new or additional information collection activities and, therefore, no information collection request will be submitted to the Office of Management and Budget for review under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

4. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, which was signed into law on March 22, 1995, sets requirements for EPA with respect to rules that contain federal mandates that may result in certain specified costs to State, local, or tribal governments. Also, before EPA establishes regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must develop under section 203 of the UMRA a small government agency plan.

The UMRA generally defines a federal mandate for regulatory purposes as one that imposes an enforceable duty upon State, local, or tribal governments or the private sector. Today's rule simply addresses the subject of EPA's discretion to initiate primacy withdrawal when a State is not maintaining the requirements for primacy and sets forth the circumstances in which EPA must begin the withdrawal process. This rule does not change the actual requirements that States must meet to maintain primacy or otherwise impose an enforceable duty on States. Similarly, this rule does not impose an enforceable duty on any other entities. Thus, there are no federal mandates in this rule for purposes of the UMRA. In addition, today's action does not establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, and so does not require a small government agency plan under UMRA section 203.

List of Subjects in 40 CFR Part 142

Environmental protection, Administrative practices and procedures, Intergovernmental relations, Reporting and recordkeeping requirements, Water supply, Indians.

Dated: June 21, 1995.

Fred Hansen,

Acting Administrator.

For the reasons set forth in the preamble, part 142, chapter 1, title 40 of the Code of Federal Regulations is amended as follows:

PART 142—NATIONAL PRIMARY DRINKING WATER REGULATIONS IMPLEMENTATION

1. The authority citation for part 142 continues to read as follows:

Authority: 42 U.S.C. 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4 and 300j–9.

§ 142.11 [Amended]

2. Section 142.11 is amended by revising paragraph (b)(2) to read as follows:

§ 142.11 Initial determination of primary enforcement responsibility.

* * * * *

(b) * * *

(2) A final determination by the Administrator that a State has met or has not met the requirements for primary enforcement responsibility shall take effect in accordance with the public notice requirements and related procedures under § 142.13.

* * * * *

§ 142.13 [Amended]

3. Section 142.13 is amended by inserting the word ''final'' before the word ''determination'' in each of the three places where the word ''determination'' occurs in paragraph (a).

§ 142.17 [Amended]

4. Section 142.17 is amended by revising the word ''§ 142.10'' in paragraph (a)(1) to read ''40 CFR part 142, subpart B,'' and by revising paragraphs (a)(2) and (a)(4) to read as follows:

§ 142.17 Review of State programs and procedures for withdrawal of approved primacy programs.

(a)(1) * * *

(2) When, on the basis of the Administrator's review or other available information, the Administrator determines that a State no longer meets the requirements set forth in 40 CFR part 142, subpart B, the Administrator shall initiate proceedings to withdraw primacy approval. Among the factors the Administrator intends to consider as relevant to this determination are the following, where appropriate: whether the State has requested and has been granted, or is awaiting EPA's decision on, an extension under § 142.12(b)(2) of the deadlines for meeting those requirements; and whether the State is taking corrective actions that may have been required by the Administrator. The Administrator shall notify the State in writing that EPA is initiating primacy withdrawal proceedings and shall summarize in the notice the information available that indicates that the State no longer meets such requirements.

* * * * *

(4) After reviewing the submission of the State, if any, made pursuant to paragraph (a)(3) of this section, the Administrator shall make a final determination either that the State no longer meets the requirements of 40 CFR part 142, subpart B, or that the State continues to meet those requirements, and shall notify the State of his or her determination. Any final determination that the State no longer meets the requirements of 40 CFR part 142, subpart B, shall not become effective except as provided in § 142.13.

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